UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 71
Charged Party

Case No. 08-CD-133004

and

THOMPSON ELECTRIC, INC.
Charging Party

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18
Party-In-Interest

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18'S POST-HEARING BRIEF

Respectfully Submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. Introduction

This matter was heard on October 22, 2014, before Hearing Officer Roberta Montgomery, conducted under the provisions of Section 10(k) of the National Labor Relations Act. ("Act"). The hearing was held pursuant to Region 8's investigation of an unfair labor practice ("ULP") charge filed by Thompson Electric, Inc. ("Thompson Electric"), in which it was alleged that the International Brotherhood of Electrical Workers, Local 71 ("IBEW 71") had violated Section 8(b)(4)(D) of the Act by threatening to engage in picketing and strike activities against Thompson Electric with an object of forcing Thompson Electric to assign the operation of forklift work to employees it represents rather than to employees not represented by IBEW 71.

While the present matter may appear to present a facial jurisdictional dispute, it is in fact the result of collusion between Anthony Allega Cement Contractor, Inc. ("Anthony Allega"), Thompson Electric, and IBEW 71 in order to prevent the International Union of Operating Engineers, Local 18 ("Local 18" or "Union") from exercising a lawful subcontracting clause as against Anthony Allega. Anthony Allega is a general contractor with whom Local 18 has a collective bargaining relationship by way of a collective bargaining agreement ("CBA"). Pursuant to that relationship, Anthony Allega is contractually bound to adhere to its mandates, including, *inter alia*, a lawful subcontracting clause. In May of 2014, Anthony Allega elected to subcontract certain work to Thompson Electric, which resulted in the violation of the CBA's subcontracting clause. Local 18 then filed a lawful subcontracting grievance against Anthony Allega, and has not engaged in any behavior that would otherwise render the present dispute jurisdictional Rather, the evidence adduced in the instant case establishes that from Day 1, Anthony Allega has worked with Thompson Electric to foment a jurisdictional dispute that is of those entities' own making. The record evidence demonstrates that Local 18 has singly enforced

its subcontracting grievance against Anthony Allega, and only communicated with Thompson Electric in limited circumstances that, under Board law, do not constitute a claim for the work identified in Thompson Electric's ULP Charge. Accordingly, there is no reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated, and the Board should quash the Notice of Hearing for the case *sub judice*.

II. Statement of Facts

Local 18 is a labor organization within the meaning of Section 2(5) of the Act. (Jt. Exh. 1, ¶ 1.) It represents the interests of heavy highway and building construction equipment operators ("operating engineers" or "Local 18 members") working in the State of Ohio. Currently, Local 18 represents operating engineers working in 85 of Ohio's 88 counties along with four counties in Northern Kentucky. (Emp. Exh. 3, pp. IV-VII.) Headquartered in Cleveland, Ohio, Local 18 operates five district offices across the state. (*Id*.) Local has negotiated a collective bargaining agreement ("CBA") with a multi-employer bargaining unit known as the Ohio Contractors Association ("OCA"). (*See id.*) This CBA is known as the OCA Agreement and governs the terms and conditions of employment for Local 18 members performing construction work within a particular geographic region and industrial range. Under the current OCA Agreement, signatory employers agree, pursuant to Paragraph 98 of the OCA Agreement, that "all subcontractors shall be subject to the terms and provisions of this Agreement, as it relates to Operating Engineers." (Emp. Exh. C, p. 40.)

Anthony Allega, a general contractor operating in the State of Ohio, is signatory to the most recent OCA Agreement which was negotiated by and between Local 18 and the OCA. (Jt. Exh. 1, ¶ 9; Emp. Exh. B.) Accordingly, Anthony Allega is bound to the mandates of the OCA's subcontracting clause contained within Paragraph 98. Paragraph 98 protects the wage scales and

employee benefits provided to Local 18's membership by mandating that Anthony Allega may only subcontract work traditionally performed by Local 18 members to those subcontractors who observe equivalent wages, hours, and other terms and conditions of employment for employees performing bargaining unit work.

On or about May 14, 2014, Local 18's representatives discovered a suspected breach by Anthony Allega of Paragraph 98 when they learned that employees that were performing bargaining unit work at a jobsite on Interstate 90 in Lake County, Ohio ("Lake County jobsite"), on behalf of Thompson Electric, an Anthony Allega subcontractor. (TR 116-118.) Local 18 representatives did no more than take pictures to document the alleged breaches, during which they were briefly confronted by a Thompson Electric employee. (*Id*.) Local 18 otherwise did not engage with Thompson Electric officials or employees in any other fashion. The sole purpose of the investigation was to determine whether Anthony Allega was in breach of Paragraph 98 by subcontracting work to Thompson Electric, where the latter was allegedly failing to observe equivalent union wages, hours, and other terms and conditions of employment pursuant to the OCA Agreement for employees that were performing Local 18 bargaining unit work.

Shortly after Local 18 made Anthony Allega aware of the suspected breach, John Allega, the President of Anthony Allega, contacted Robert Mileski, Thompson Electric's Chief Estimator (TR 115: 17-19), and informed him that there was a contractual dispute between Local 18 and Anthony Allega. (TR 118: 16-25 – 119: 1-3.) While Mr. Allega indicated that the dispute was between Local 18 and Anthony Allega, he insisted that Thompson Electric contact Local 18. (*Id*.) Accordingly, in late May of 2014, Mr. Mileski placed an unsolicited call to Local 18, and spoke with Don Taggart, a Local 18 representative. (TR 119: 15-20.) During this call, Mr. Mileski, on behalf of Thompson Electric, asked Mr. Taggart what Thompson Electric could do to

resolve the contractual dispute between Local 18 and Anthony Allega. (TR 92: 3-23.) In response, Mr. Taggart simply offered that Thompson Electric could become signatory to the OCA Agreement with Local 18 or have some individuals employed by Thompson Electric at the Lake County jobsite temporarily be employed by Anthony Allega, such that Anthony Allega would remit fringe benefits to Local 18 and pay the employees the prevailing wage for the limited time they operated equipment. (TR 120: 1-8.) In response to another call placed by Mr. Mileski (TR 125: 6-10), Mr. Taggart left a voicemail for Mr. Mileski on May 21, 2014 restating the same offer he had previously made on behalf of Local 18. (TR 123: 8-25 – 124: 1-19.) Messrs. Taggart and Mileski spoke for a third time on May 27, 2014, where, in response to Thompson Electric's request for resolution options, Mr. Taggart offered that Thompson Electric could become signatory to a Project Labor Agreement ("PLA") for the duration of the Lake County jobsite project. (TR 126: 20-25 – 127: 1-3, 11-24.)

Ultimately, Thompson Electric rejected all the offers that Local 18 had provided in response to its inquiry, originally made at the behest of Anthony Allega, for resolving Local 18's subcontracting grievance against Anthony Allega. (TR 93: 15-20.) As Thompson Electric acknowledged, Local 18 unconditionally accepted this rejection without threats or claims to the work and otherwise made no further contact with Thompson Electric. (TR 93: 18-25 – 94: 1-2.)

Undeterred by Local 18's refusal to actively engage with Thompson Electric such that its lawful subcontracting grievance remained non-jurisdictional in nature, Anthony Allega continued its machinations by sending a letter, issued by Mr. Allega, to Thompson Electric on June 10, 2014 concerning Local 18's grievance – which it had not yet filed – against Anthony Allega. The letter began by misrepresenting the nature of the grievance, claiming that Thompson Electric's "operator is in violation of our contract." (Emp. Exh. M.) Local 18 was only raising a

grievance as against Anthony Allega; Thompson Electric could not be in violation of a CBA to which it was not a party. Mr. Allega then specifically requested that Thompson Electric become embroiled in a contractual dispute that was formally between Local 18 and Anthony Allega, stating that "I am looking for Thompson Electric to help us in the fight." (*Id*.) Anthony Allega's full intent to construct a sham jurisdictional dispute wherein Thompson Electric would play the role as the aggrieved employer was laid bare when Mr. Allega declared that he felt Local 18's grievance was in fact "a jurisdictional dispute" and hoped that Thompson Electric could "assist us in whatever information we will need to help support *your argument* that [IBEW] Local 71 has operating engineers in their agreement [with Thompson Electric]." (*Id*., emphasis added.) Mr. Allega further stated to Thompson Electric that "I am offering you an easy solution, today, and I think that I can convince Local 18 to agree to replace your operator on the job, effective immediately, with a Local 18 operator until your portion of the project is completed for me. I am not guaranteeing that Local 18 will accept this deal[.]" (*Id*.) As conceded by Thompson Electric, nowhere in the letter did Mr. Allega indicate that Local 18: 1) sought the work at issue; 2) sought to replace any Thompson Electric employees represented by IBEW 71; or 3) would take any action against Thompson Electric if it did not replace its employees with Local 18 members. (TR 89: 7-23.) Indeed, Local 18 made no representations in that letter, and it only states that Local 18 had filed a subcontracting grievance against Anthony Allega. (TR 90: 3-9.)

Thereafter, on June 12, 2014, Local 18's representative hand-delivered a written grievance, dated identically, to an Anthony Allega official specifically stating the basis of the Union's grievance – Anthony Allega's breach of Paragraph 98. (Emp. Exh. H.) Specifically, the grievance alleged that Anthony Allega was in breach of Paragraph 98 by subcontracting work to Thompson Electric, where the latter was failing to observe equivalent union wages, hours, and

other terms and conditions of employment pursuant to the OCA Agreement for employees that were performing Local 18 bargaining unit work. (*Id.*) The grievance was completely unconcerned with, nor spoke to whether Thompson Electric was a signatory to any CBAs nor whether what, if any union, was representing Thompson Electric employees.

Thompson Electric further attempted to manufacture a bogus jurisdictional dispute by making IBEW 71 aware of Local 18's subcontracting grievance against Anthony Allega. Specifically, Bill Anderson, Thompson Electric's Vice President, sent Bryan Stage, IBEW 71's Business Manager, a letter on June 18, 2014, wherein he enclosed Local 18's grievance filed against Anthony Allega, as well as Anthony Allega's June 10 letter that exhorted Thompson Electric to craft a jurisdictional dispute such that it could evade its contractual obligations under Paragraph 98 of the OCA Agreement. (IBEW 71 Exhs. 1 and 2.)

Subsequently, with the intent of further steering its contractual dispute with Local 18 into the realm of the jurisdictional, Anthony Allega sent a written correspondence to Local 18 on June 20, 2014 denying Local 18's grievance wherein it claimed that the grievance was untimely and that subcontracting clause of the OCA Agreement was "illegal and unenforceable." (L18 Exh. 1.) Conspicuously absent was any reference to a jurisdictional conflict between IBEW 71 and Local 18 nor was there any mention of any purported claim for the work, or request for a change of assignment. This absence is explained by the fact that none of these events occurred. Accordingly, under the OCA Agreement's grievance and arbitration provisions (Emp. Exh. B), Local 18 referred its June 12 grievance to binding arbitration on July 17, 2014 (L18 Exh. 2.)

Nearly a month later, Mr. Stage replied to Thompson Electric's June 18 letter with a purported threat to strike on behalf of IBEW 71 on July 11, 2014. (Emp. Exh. E.) However, that correspondence contained a number of patent misrepresentations. It first indicated that, based

purely upon Local 18's subcontracting grievance against Anthony Allega and Mr. Allega's June 10 letter, "Local 18 would favor Thompson Electric replace our IBEW Local 71 operator with an operator from Local 18." (*Id*.) However, nothing in Local 18's grievance nor the June 10 letter demonstrated that Local: 1) sought the work at issue; 2) sought to replace any Thompson Electric employees represented by IBEW 71; or 3) would take any action against Thompson Electric if it did not replace its employees with Local 18 members. (TR 89: 7-23.)

On July 18, 2014 Thompson Electric filed its Section 8(b)(4)(D) ULP Charge against IBEW 71, asserting that IBEW 71 had threatened, coerced, or restrained Thompson Electric with the object of forcing the subcontractor to assign particular work to employees represented by IBEW 71 at the Lake County jobsite instead of assigning it to employees not represented by IBEW 71. Even though Thompson Electric agreed that the primary basis of filing the charge was due to Local 18's responsive offer, upon Thompson Electric's persistent inquiries, to have Thompson Electric become signatory to a CBA with Local 18 or have some of its employees temporarily go under Anthony Allega's payroll (TR 103: 6-21), the charge contained no allegations against Local 18 that it had made any claims to the work at the Lake County jobsite or had otherwise it either engaged in coercive conduct pursuant to Section 8(b)(4)(D).

Thompson Electric and Anthony Allega continued to communicate during the following months concerning the status of Local 18's grievance and Thompson Electric's ULP charge. (TR 100-103.) On October 21, 2014, Anthony Allega, informed Thompson Electric that, in the event that Anthony Allega was assessed damages or penalties if Local 18 prevailed in its subcontracting grievance, Anthony Allega would not pass on these damages to Thompson Electric. (TR 94: 3-25 – 95: 1-15.)

III. Statement of the Case

On September 11, 2014 Region 8 formally issued a Notice of Hearing in the present matter. Pursuant to that formal notice, a hearing under Section 10(k) of the Act was scheduled to open on September 22, 2014. The Region subsequently issued a Revised Notice of Hearing, where it set the hearing to commence on October 22, 2014.

IV. Law & Analysis

A. The Regional Director's Notice of Hearing Should be Quashed Because No Reasonable Cause Exists to Believe That Section 8(b)(4)(D) of the Act Has Been Violated.

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must first be satisfied that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated. *Laborers Dist. Council (Capitol Drilling Supplies, Inc.)*, 318 NLRB 809, 810 (1995). This determination requires a finding that there is reasonable cause to believe that: (1) a party has used proscribed means to enforce its claims to the work in dispute; (2) there are competing claims to the disputed work between rival groups of employees; and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute. *Carpenters Local 275 (Lymo Construction Co.)*, 334 NLRB 422, 423 (2001). The factual predicate for asserting a colorable Section 10(k) dispute is therefore found when an employer faces a proscribed means of enforcing a claim to disputed work as a result of a jurisdictional dispute that is not of his own making and in which he has no interest. *Internatl. Longshormen's & Warehousemen's Union Local 62-B v. NLRB*, 781 F.2d 919, 924 (D.C.Cir.1986). When examining evidence proffered to satisfy the "reasonable cause" standard, evidence must be "viewed in its entirety" and the Region must do so by looking at the "specific language used and surrounding conduct and events." *Bricklayers Local 20 (Altounian Builders, Inc.)*, 338 NLRB

1100, 1101 (2003). For the following reasons, Thompson Electric's ULP Charge alleging a violation of Section 8(b)(4)(D) of the Act by IBEW 71 is in no way, shape, or form amenable to resolution via a Section 10(k) proceeding because Local 18 has made no claim to the work at issue.

i. Local 18 has Made no Claim to the Work in Dispute Because it is Peacefully Pursuing a Subcontracting Grievance Against a General Contractor, Anthony Allega.

It is a fundamental tenet of Board precedent that in the construction industry, a union's efforts to enforce a lawful union signatory subcontracting clause against a general contractor through a grievance, arbitration, or court action does *not* constitute a claim against the subcontractor for the work, thus being insufficient to trigger Section 8(b)(4)(D) allegations and subsequent Section 10(k) proceedings, provided that the union limits itself to peacefully pursuing the contractual grievance against the general contractor. *E.g., Laborers Dist. Council (Capitol Drilling)*, 318 NLRB at 809. Specifically, where the union pursuing a subcontracting clause grievance against a general contractor does not otherwise "engage[] in any dispute" with the subcontractor or seek to "enforce its position by either threatening to, or actually, picketing, striking, or boycotting," the Board will find no competing claims to the work (even where the other union may have made claims for work otherwise engaged in coercive conduct), pursuant to *Capitol Drilling*, and quash the notice of hearing. *Laborers Local 1086 (Miron Constr. Co.)*, 320 NLRB 99, 100 (1995). Notably, Local 18's subcontracting clause contained in Paragraph 98 of the OCA Agreement (Emp. Exh. C.) is not even as demanding as the lawful union signatory provision the Board intended on protecting, as it does not require that subcontractors become signatories to the OCA Agreement, but only requires that Anthony Allega utilize subcontractors that adhere to the standards of the OCA Agreement.

The Board explicitly realized in *Capitol Drilling* that if the "peaceful pursuit" of subcontracting grievances was treated as a competing claim in a Section 10(k) dispute, "the contracting arrangements that Congress sought to shield from statutory prohibition" would be "too easily subverted by the ability of parties that profit from the breach of the subcontracting provision to initiate 10(k) proceedings." *Laborers Dist. Council (Capitol Drilling)*, 318 NLRB at 811. That is, if the Board exercised its jurisdiction regarding these subcontracting grievances, the "resources of the Board and the parties" will "have been taken up over a dispute that raised none of the concerns that animated Congress in enacting Section 10(k)." *Id*. The Board furthermore recognized that declining jurisdiction by not treating subcontracting grievances as triggers to Section 8(b)(4)(D) allegations would "effectuate the policies of the Act by recognizing a party's right, and enabling a party to effectively exercise the right, to enforce a lawful union signatory clause in a collective-bargaining agreement, while continuing to provide an avenue for innocent employers, who are subject to competing jurisdictional claims, to obtain relief from the Board through a 10(k) proceeding and award." *Id.* at 812.

Moreover, any effect that a lawful subcontracting grievance against a general contractor has upon the subcontractor's assignment of work or the contractual terms upon which the subcontracting grievance is based are utterly irrelevant for the purposes of determining that the Board has no jurisdiction in this matter. As the Board eloquently put it:

> Although the first union's successful prosecution of its grievance may, as a practical matter, induce the general contractor to withdraw the work from the subcontractor or otherwise bring about the removal of the employees represented by the second union, the fact remains that the first union never engaged in any dispute with the subcontractor. And in such a case the general contractor's actions reflect merely its fulfillment of its union signatory subcontracting obligation under the collective-bargaining agreement with the first union. *Laborers Dist. Council (Capitol Drilling)*, 318 NLRB at 810.

The continuing importance and relevance of *Capitol Drilling* cannot be understated. Indeed, this opinion was the final distillation of Board decisions that essentially recognized its central holding. In a prior decision, the Board stated that when a union peacefully pursues a lawful union signatory subcontracting clause against a general contractor without any other conduct towards the subcontractor, the subcontractor is not a party to the grievance and the general contractor can never be considered a "neutral employer" with respect to the grievance in the context of a potential Section 10(k) proceeding. *Carpenters Local 33*, 289 NLRB 1482, 1484 (1988). As such, a union's grievance will "not amount to unlawful coercion within the meaning of the Act." *Id*.

Generally, where a union requests that an employer sign an agreement that requires the use of employees represented by that union for the work in dispute, such a request only constitutes a claim for work when it is coupled with additional conduct by the union, such as a prevailing wage lawsuit, that specifically seeks reassignment of the work. *E.g.*, *Southwest Regional Council of Carpenters (Standard Drywall, Inc.)* 348 NLRB 1250, 1253 (2006). *Accord Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005) (where union requested employer to sign an agreement to utilize employees it represented for work in dispute, but also expressed to employer that it wanted the opposing union to stop doing its work, the union's conduct as a whole constituted a claim for work).

In the context of a union attempting to enforce a lawful subcontracting clause with a general contractor, where the union actively attempts to have the subcontractor become signatory to the union's agreement, such conduct alone is insufficient to establish a claim for work. *See Electrical Workers Local 702 (F.W. Electric, Inc.)*, 337 NLRB 594, 595 (2002). A claim for work will only be found when the union's representational efforts are coupled with the union's

express and unambiguous claim for the work directed to the subcontractor. *Id*. *See also Iron Workers Local 1*, 340 NLRB 1158, 1160 (2003) (where the union does not confine its action to a peaceful pursuit of a subcontracting grievance against the general contractor, but makes "a direct claim to the subcontractor for the disputed work" the union has made a claim to the work, subcontracting grievance notwithstanding).

Under the foregoing precedent, it is clear beyond surfeit that the present dispute is not jurisdictional in nature because Local 18 has only peacefully pursued its subcontracting grievance against Anthony Allega. As a threshold matter, never at any point was Thompson Electric a party to Local 18's June 12, 2014 grievance against Anthony Allega. (*See* Emp. Exh. H.) This grievance was completely unconcerned with, nor spoke to, whether Thompson Electric was a signatory to any CBAs, nor whether what, if any union, was representing Thompson Electric employees. (*Id*.) This grievance was made *vis-à-vis* Local 18 and Anthony Allega. To the extent Thompson Electric was initially involved, it happened to merely be the subcontractor that was failing to observe equivalent union wages, hours, and other terms and conditions of employment for employees that were performing Local 18's bargaining unit work.

Yet, at the directive of Anthony Allega, Thompson Electric injected itself into a contractual dispute in which it had no role. Upon multiple requests by Thompson Electric made at the dictate of Anthony Allega (TR 92: 3-23, 125: 6-10, 126: 20-25 – 127: 1-3, 11-24) in an effort to effectuate a sham jurisdictional dispute – as described in Section IV(A)(ii) of Local 18's Post-Hearing Brief – Local 18's offers to Thompson Electric that it consider becoming signatory to the OCA Agreement or have some of its employees temporarily go under the payroll of Anthony Allega (TR 120: 1-8, 123: 8-25 – 124: 1-19, 126: 20-25 – 127: 1-3, 11-24) were otherwise unaccompanied by any other behavior. Specifically, in response to Thompson

Electric's rejection of its requested offers (TR 93: 15-20), Local 18 unconditionally accepted this rejection without threats or claims to the work and otherwise made no further contact with Thompson Electric. (TR 93: 18-25 – 94: 1-2.) Critically, when Anthony Allega described the nature of Local 18's subcontracting grievance to Thompson Electric, it made clear that Local 18 was not making a claim to the work allegedly in dispute. In his June 10, 2014 letter to Thompson Electric, Mr. Allega stated that "I think that I can convince Local 18 to agree to replace your operator on the job, effective immediately, with a Local 18 operator until your portion of the project is completed for me. I am not guaranteeing that Local 18 will accept this deal[.]" (Emp. Exh. M.) Nowhere in these statements does Anthony Allega contend that Local 18 is making a claim for work. Rather, Anthony Allega is making a proposal to Thompson Electric that *it* believes Local 18 will accept. This reality was confirmed when Mr. Allega acknowledged – because these were simply his own representations – that he had no idea whether Local 18 would accept the proposal. Indeed, Thompson Electric acknowledged Anthony Allega never claimed that Local 18: 1) sought the work at issue; 2) sought to replace any Thompson Electric employees represented by IBEW 71; or 3) would take any action against Thompson Electric if it did not replace its employees with Local 18 members. (TR 89: 7-23.)

The record evidence demonstrates that as a whole, Local 18 has single-mindedly and peacefully pursued its subcontracting grievance against Anthony Allega. (*See* Emp. Exh. H, L18 Exhs. 1-2.) As such, Local 18's offers to Thompson Electric do not render the pursuit of its lawful union subcontracting grievance a claim to the work and thus fails to provide reasonable cause to believe that Section 8(b)(4)(D) was violated. *E.g., Southwest Regional Council of Carpenters (Standard Drywall, Inc.),* 348 NLRB at 1253 (2006); *Electrical Workers Local 702 (F.W. Electric, Inc.),* 337 NLRB at 595. Any effect Local 18's lawful subcontracting grievance

against Anthony Allega may have against Thompson Electric's assignment of the work plays no role in determining that Local 18's conduct is a simple subcontracting grievance not subject to Board jurisdiction under Section 10(k) of the Act. *See Laborers Dist. Council (Capitol Drilling)*, 318 NLRB at 810.

Thompson Electric cannot rely on the Board's Decision and Determination of Award in *Electrical Workers Local 71 (Thompson Electric, Inc.)*, 354 NLRB 344 (2009) (hereinafter *Thompson Electric I*) in arguing that the present matter is jurisdictional dispute. That case is inapplicable both as matter of fact and law. There, the Board ultimately found that there was reasonable cause to believe that Section 8(b)(4)(D) of the Act was violated because, in relevant part, Local 18 had claimed the work. *Id*. at 346. While Local 18 had initially offered to have Thompson Electric sign a CBA with Local 18 or have some of its employees temporarily go under the payroll of the general contractor, Shelly & Sands, Inc. ("Shelly"), the Board found that such behavior was coupled by other circumstances, absent in the instant case, establishing as a whole that Local 18 had claimed the work. Specifically: 1) Local 18 participated in in-person meetings with both Thompson Electric and Shelly, *id*.; 2) both Local 18 and Thompson Electric testified that a Local 18 representative had expressly and repeatedly stated that any equipment with rubber tires or tracks was Local 18's work during the in-person meeting, *id*. at 345, fn. 4, 346; and 3) Thompson Electric acquiesced to a request from Shelly to allow Local 18 members to perform the disputed work for a small period of time, and Thompson Electric then reimbursed Shelly for the cost of employing operating engineers, with such work performed by operating engineers constituting a claim to it by Local 18, pursuant to Board precedent. *Id*. at 346.

Unlike in *Thompson Electric I*, Local 18 never participated in or facilitated in-person meetings with both Anthony Allega and Thompson Electric present. Rather, Local 18 solely

focused on enforcing its lawful subcontracting grievance against Anthony Allega, *see, e.g.*, *Southwest Regional Council of Carpenters (Standard Drywall, Inc.)*, 348 NLRB at 1253 (2006); *Electrical Workers Local 702 (F.W. Electric, Inc.)*, 337 NLRB at 595, engaging in limited phone communications with Thompson Electric only upon its repeated attempts to reach out to Local 18. (TR TR 118: 16-25 – 119: 1-3, 15-20, 92: 3-23, 120: 1-8, 125: 6-10, 123: 8-25 – 124: 1-19, 126: 20-25 – 127: 1-3, 11-24.) Further, there was no testimony in the current matter by Local 18 that any of its agents made any statements claiming that equipment with tracks or rubber tires belonged to Local 18. Finally, Thompson Electric, unlike its conduct in *Thompson Electric I*, never permitted Local 18 to work in a composite crew and nor paid Anthony Allega the costs for doing the same. In fact, Anthony Allega explicitly told Thompson Electric that it would not incur any punitive costs based on the outcome of Local 18's subcontracting grievance. (TR 94: 3-25 – 95: 1-15.) These critical factual differences illustrate that the Board's decision in *Thompson Electric I* is neither applicable nor binding on the outcome of the instant case.

Thompson Electric I's factual inapplicability notwithstanding, it lacks any precedential value pursuant to the Supreme Court of the United States' decision in *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 130 S.Ct. 2635, 177 L.Ed.2d 162 (2010). There, the Supreme Court held that the Act did not allow a two-member Board panel to exercise its power in deciding cases. *Id*. at 683. The Supreme Court then essentially held that all orders issued by the two-member group, from 2007 through 2009, to be invalid. *See id*. at 688 ("We thus hold that the delegation clause requires that a delegee group maintain a membership of three in order to exercise the delegated authority of the Board"). *Thompson Electric I* is one such case that falls under this umbrella, as it was decided in 2009 by a two-member Board group – Wilma Liebman and Peter Schaumber. As early as 2012, the Board recognized that two-member decisions lack precedential value, when, in

the August 2012 edition of its Outline of Law and Procedure in Representation Cases, the editor's note commented that the two-member decisions "are of little if, any, precedential value." National Labor Relations Board, *An Outline of Law and Procedure in Representation Cases*, Editor's Note (2012). And very recently, the Board acknowledged that the two-member cases, such as *Thompson Electric I*, are not valid precedent. *See Copper River of Boiling Springs, LLC*, 360 NLRB No. 60 (2014) (Board affirmed ALJ's decision wherein the ALJ specifically rejected the General Counsel's reliance on *Ridgeview Indus.*, 353 NLRB 1096 (2009) as "not a [sic] valid precedent" because it was a two-member decision rendered invalid by *New Process Steel, L.P.*). Accordingly, *Thompson Electric I* is not binding on the Board's determination of the present case as it was decided by a two-member Board group, the makeup of which is not permitted by the Act, and is therefore an invalid decision. *New Process Steel, L.P.*, 560 U.S. at 683.

ii. Thompson Electric is Not an Innocent Employer Caught Between Two Competing Union Work Demands, but Rather Has Engaged in Collusion with Anthony Allega and IBEW 71 to Fashion a Sham Jurisdictional Dispute.

The evidence in the present matter overwhelmingly demonstrates the blatant collusion by Anthony Allega, Thompson Electric, and IBEW 71 to fashion a sham jurisdictional dispute. Where the employer by its "unilateral action created the dispute," it cannot avail itself of the Board's jurisdiction pursuant to Section 10(k). *Teamsters Union (Safeway Stores, Inc.)*, 134 NLRB 1320, 1322 (1961). To subordinate Local 18's grievances to unwarranted Section 10(k) proceedings would, in effect, reward Thompson Electric for placing itself in an alleged jurisdictional dispute that is of its own making. A Section 10(k) procedure is not "an absolution for employers that find themselves stuck between conflicting contractual obligations they created" nor is designed to "exonerate employees with unclean hands" but rather resolves legitimate "jurisdictional disputes that arise between unions without costly work stoppages . . ."

Moore-Duncan v. Sheet Metal Workers Intl. Assn. Local 27, 624 F.Supp.2d 367, 377 (D.N.J. 2008). As such, when the alleged jurisdictional dispute is of the employer's own making, it is not neutral in the dispute as required under Section 10(k). Rather, the employer has an interest in one group over another to perform the work at issue. *See Maritime Union (Puerto Rico Marine Mgmt.)*, 227 NLRB 1081, 1083 (1977).

In order to establish that a jurisdictional dispute is a sham, affirmative evidence of collusion must be demonstrated. *Laborers Local 317 (Grazzini Bros. & Co.)*, 307 NLRB 1290, 1291 (1992), fn. 5. In the instant case, the record evidence unquestionably establishes there is collusion. From the very beginning of this dispute in May of 2014, Anthony Allega and Thompson Electric intended to convert Local 18's lawful subcontracting grievance against Anthony Allega, the general contractor, into a jurisdictional dispute by unsuccessfully attempting to provoke Local 18 to inappropriately engage with Thompson Electric, the subcontractor. Anthony Allega made it clear that the initial conflict was merely contractual, and between it and Local 18, yet it wanted Thompson Electric to immediately contact Local 18. (TR 118: 16-25 – 119: 1-3.) Accordingly, Thompson Electric repeatedly reached out to Local 18 with requests to engage in discussions about the dispute, such that it would appear that Local 18 was improperly engaging with Thompson Electric and thereby transform its contractual dispute with Anthony Allega into a jurisdictional dispute with Thompson Electric. (TR 119: 15-20, 123: 8-25 – 124: 1-19, 126: 20-25 – 127: 1-3, 11-24.)

The contractor-subcontractor collusion was further exposed when Anthony Allega revealed to Thompson Electric in June of 2014 that its dispute with Local 18 involved a subcontracting grievance not amenable to Board jurisdiction by way of Section 10(k) proceedings, yet illogically stated that Thompson Electric was in violation of the OCA

Agreement, even though it was not a party to that CBA. (Emp. Exh. M.) Anthony Allega spurred Thompson Electric into crafting a sham jurisdictional dispute by becoming embroiled in a contractual dispute that was formally between only Local 18 and Anthony Allega, as it was "looking for Thompson Electric to help us in the fight." (*Id*.) Thompson Electric did so by filing its Section 8(b)(4)(D) charges and ultimately pressing them to a Section 10(k) hearing. Anthony Allega's intent to construct a sham jurisdictional dispute wherein Thompson Electric would play the role as the aggrieved employer was further clarified when Mr. Allega declared that he felt Local 18's grievance was in fact "a jurisdictional dispute" and hoped that Thompson Electric could "assist us in whatever information we will need to help support *your argument* that [IBEW] Local 71 has operating engineers in their agreement [with Thompson Electric]." (*Id*., emphasis added.) However, at no point did Anthony Allega ever allege, indicate, or suggest in its communications with Thompson Electric that Local 18: 1) sought the work at issue; 2) sought to replace any Thompson Electric employees represented by IBEW 71; or 3) would take any action against Thompson Electric if it did not replace its employees with Local 18 members. (TR 89: 7-23.)

Thompson Electric further attempted to manufacture a bogus jurisdictional dispute by making IBEW 71 aware of Local 18's subcontracting grievance against Anthony Allega on June 18, 2014. (IBEW 71 Exhs. 1 and 2.) Accordingly, IBEW 71 gained receipt of Local 18's subcontracting grievance against Anthony Allega and the latter's June 10 letter that exhorted Thompson Electric to craft a jurisdictional dispute such that Anthony Allega could evade its contractual obligations under Paragraph 98 of the OCA Agreement. (IBEW 71 Exhs. 1 and 2.) Unsurprisingly, IBEW 71's resulting threat to strike against Thompson Electric contained obvious mistruths that were the result of the collusion between Thompson Electric and Anthony

Allega. Specifically, IBEW 71 pointed out that based purely upon Local 18's subcontracting grievance against Anthony Allega and Mr. Allega's June 10 letter, "Local 18 would favor Thompson Electric replace our IBEW Local 71 operator with an operator from Local 18." (Emp. Exh. E.) However, that correspondence contained a number of patent misrepresentations. Anthony Allega was only describing proposals that *it* believed Local 18 would accept, although could make no guarantees on. (Emp. Exh. M.) In sum, nothing in Local 18's grievance nor the June 10 letter demonstrated that Local: 1) sought the work at issue; 2) sought to replace any Thompson Electric employees represented by IBEW 71; or 3) would take any action against Thompson Electric if it did not replace its employees with Local 18 members. (Emp. Exh. M; TR 89: 7-23.)

Even up to the very day prior to the Section 10(k) hearing, Thompson Electric and Anthony Allega were engaged in collusion. While Anthony Allega initially threatened to pass on any potential damages it would be assessed to Thompson Electric if it lost the subcontracting grievance against Local 18, in order to render the dispute congruent with prior, albeit invalid, precedent in *Thompson Electric I*, it made an about-face on October 21, 2014. Specifically, Anthony Allega agreed that no such penalties would be passed on to Thompson Electric, indicating that it had no interest to do so in the first place (TR 94: 3-25 – 95: 1-15), and only made such a threat in the hope that Local 18's subcontracting grievance would be converted into a jurisdictional dispute.

At bottom, Thompson Electric has shed its façade as an impartial employer caught between the demands of two competing unions. Instead, it stands as an active participant, along with Anthony Allega and IBEW 71, in a jurisdictional dispute it created in an attempt to help Anthony Allega avoid its contractual obligations to Local 18 pursuant to Paragraph 98, the

lawful subcontracting grievance under the OCA Agreement to which Local 18 and Anthony Allega are parties. Ultimately, when the employer is responsible for inducing the alleged jurisdictional dispute between the unions, such a dispute is not amenable to resolution by way of Section 10(k) proceedings. *See, e.g., Teamsters Union (Safeway Stores, Inc.)*, 134 NLRB at 1322.

B. Even Assuming *Arguendo* That the Board Has Reasonable Cause to Believe that Section 8(b)(4)(D) of the Act Has Been Violated, the Board's Current Process in Making a Determination Upon the Merits is Arbitrary and Capricious.

While the Supreme Court instructed the Board with evaluating jurisdictional disputes on their merits by way of appropriate standards based upon its experience and common sense, *NLRB v. Radio & Television Broadcast Engineers Union Local 212 (Columbia Broadcasting System)*, 364 U.S. 573, 583, 81 S.Ct. 330, 5 L.Ed.2d 302 (1961), the reality is that there is no such principled rubric by which the Board can make these evaluations. While the Board, many decades ago, developed a series of "relevant factors" to consider "in determining who is entitled to the work in dispute," *Machinists Lodge 1743 (J.A. Jones Constr. Co.)*, 135 NLRB 1402, 1410 (1961), the Board's current exercise in this factor-based analysis is fatally flawed. Because the Board "has consistently maintained that its policy in making § 10(k) work awards is to decide each case on its own merits without announcing any standards or principles which govern the decisions that are made," this "practice has relieved the Board of the burden of reconciling its decisions either with precedent or with any predetermined set of standards." *NLRB v. Internal. Longshoremen's & Warehousemen's Union*, 504 F.2d 1209, 1219-1220 (9th Cir. 1974). As a result, "[n]obody can dispute the conclusion; nobody can say, except as a matter of personal taste, whether the result is good or bad." *Id.* Yet independent and federal court reviews of the

Board's jurisdictional dispute resolutions conclude that "the Board's work award coincides 'in virtually every case' with the employer's preference." *Id*. (internal citations omitted.)

While, during the proceedings before Hearing Officer Montgomery in the present action, testimony was elicited concerning the *Jones* factors, the Board should rely on them with great wariness. All other factors aside, Thompson Electric made it clear that it prefers IBEW 71 members to perform the work at issue. However, as made abundantly clear in Section IV(A)(ii) of Local 18's Post-Hearing Brief, such a desire is part and parcel of its collusion with Anthony Allega to fashion a sham jurisdictional dispute. Therefore, to the extent the Board relies on evidence purportedly related to the merits of this case in fashioning a decision, unless and until it "articulate[s] any decisionmaking standards" and recognizes that *legitimate* employer preference, absent here, is by far the controlling factor in adjudicating jurisdictional disputes, such factor-based analysis is arbitrary and capricious. *See Internal. Longshoremen's & Warehousemen's Union*, 504 F.2d at 1219, 1221-1222.

C. Thompson Electric is Not Entitled To An Area-Wide Award.

The Board will only consider issuing an area-wide award if the disputed work has been a continuous source of controversy in the relevant geographic area, related disputes are likely to reoccur, and the charged union has shown a proclivity to use proscribed means in an attempt to secure similar disputed work. *Operating Engineers Local 318 (Foeste Masonry)*, 322 NLRB 709, 714 (1996), citing *Iron Workers Local 1 (Fabcon)*, 311 NLRB 87, 93 (1993). *Accord Bricklayers Local 21 (Sesco Inc.)*, 303 NLRB 401, 403 (1991). Under Board precedent, in order for proclivity by the charged party to be established, the offending conduct must extend beyond the employers in the action to other non-party contractors and into neutral settings unrelated to the work in dispute. *E.g.*, *Sheet Metal Workers, Local 19 (E.P. Donnelly)*, 345 NLRB 960, 965

(2005). *Accord Electrical Workers IBEW Local 103 (Lucent Technologies)*, 333 NLRB 828, 831–832 (2001). All three of these prerequisites must be satisfied and the evidentiary burden in doing so is demanding because "a 10(k) award is ordinarily limited in scope to the particular job-site or jobsites where the proscribed 8(b)(4)(D) conduct has occurred." *IBEW Local 104 (Standard Sign & Signal Co.)*, 248 NLRB 1144, 1148 (1980).

Thompson Electric cannot demonstrate that a broad award is warranted under the exacting evidentiary standard required by the Board to issue the same. The record is absent of any evidence that would indicate the disputed work has been a continuous source of controversy that would cause similar reoccurrences *and* that Local 18 has demonstrated a habit to use proscribed means to secure such disputed work. *See Operating Engineers Local 318 (Foeste Masonry)*, 322 NLRB at 714. The existence alone of Local 18's lawful subcontracting grievance as against Anthony Allega is insufficient to justify a broad award absent evidence of other threatening behavior by the union against whom the award is made. *See IBEW Local 211 (Sammons Communications)*, 287 NLRB 930, 934 (1987) (broad 10(k) award granted in consideration of prior jurisdictional awards *only if* coupled with threat by union against whom award was made to "cause trouble on every other" employer job site). Local 18 is not the charged party in the instant case, nor was it in *Thompson Electric I*. Unsurprisingly, the record contains no evidence of any continuous threatening behavior by Local 18 to claim the work in dispute as against Thompson Electric or "other non-party contractors and intro neutral settings unrelated to the work in dispute." *Sheet Metal Workers, Local 19 (E.P. Donnelly)*, 345 NLRB at 965. As such, there is no justification for an area-wide award in the present case.

Moreover, "[t]he Board customarily declines to grant a broad, area-wide award in cases where the charged party represents the employees to whom the work is awarded and to whom the

employer contemplates continuing to assign the work." *E.g.*, *Ohio and Vicinity Regional Council of Carpenters (Competitive Interiors)*, 348 NLRB 266, 271 (2006). If the Board deigns to award the work to the Charged Party IBEW 71 and Thompson Electric continues assigning the work at issue to IBEW 71, the notion of an area-wide award lacks complete merit in this dispute.

V. Conclusion

Based on all the foregoing, there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated as Local 18 has made no claims to the work at issue nor engaged in any relevant coercive conduct, but rather merely sought vindication of its contractual rights by resolution of a wholly arbitrable manner outside the scope of the Board's jurisdiction. Accordingly, Local 18 respectfully requests that the Regional Director's Notice of Hearing be Quashed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Post-Hearing Brief was filed with National Labor Relations Board and served to the following via email on this 3rd day of November 2014:

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